

THE YALE LAW JOURNAL

EDITORIAL BOARD

HENRY W. TRIMBLE, JR.
Editor-in-Chief

SAMUEL D. MERCER
Article and Book Review Editor

ALBERT ROSENBLUM
PHILIP MANDEL
Comment Editors

DAVID C. GORDON
Case Editor

PHILIP B. BROWN
FRANCIS W. COKER, JR.
EDWARD R. CUNIFFE, JR.
ALICE EHRENFELD

JOHN P. FURMAN
ALVIN GALLEN
JOHN H. HEIRES
DONALD F. KEEFE

JOHN B. BRUECKEL
JUSTIN M. GOLENBOCK
Note Editors

WILLIAM T. BAHLMAN, JR.
Business Manager

LOUIS F. OBERDORFER
HART H. SPIEGEL
CLIFTON J. STRATTON, JR.
JAMES D. TREDUP

Subscription price \$4.50 per year

\$1.25 per number

Canadian subscription price \$5.00 per year; Foreign, \$5.25 per year

Yale Law Journal Company, Inc., Box 401A, Yale Station, New Haven, Conn.

HARLAN FISKE STONE

The Yale Law Journal records its sorrow at the death of Harlan Fiske Stone, Chief Justice of the United States since 1941, and Associate Justice since 1925. In his death both the Union and the profession sustain a great loss.

THE VALIDITY OF ABSENTEE MARRIAGE OF SERVICEMEN

DURING the Second World War, servicemen overseas wedded sweethearts at home ¹ without specific authorization by law.² As a result, the validity of

1. The most common means are proxy or telephone ceremonies, or contracts, signed by proxy or exchanged by mail. See Reynolds, *Where There's a Will There's a Wedding*, *N. Y. Sunday News*, Sept. 3, 1944, pp. 28-9; O'Neill, *Most Married Man in America*, *Yankee*, Oct. 5, 1945, p. 11 condensed in *Reader's Digest*, Dec. 1945, p. 75; *Kan. City Star*, Mar. 4, 1946, p. 3, col. 2 (attorney's 50th appearance as proxy in ceremony); *N. Y. Times*, July 29, 1945, § 4, p. 2, col. 7 (24th Tulsa proxy wedding).

Sporadic instances of absentee marriage occurred in World War I. See *N. Y. Times*, Oct. 8, 1917, p. 7, col. 2 (telephone); *id.*, June 1, 1918, p. 11, col. 4, and June 22, 1918, p. 9, col. 5 (telegraph). The Judge Advocate General of the Army suggested soldiers in the AEF resort to marriage by mail. *N. Y. Times*, Jan. 30, 1919, p. 4, col. 3. See KOEGEL, *COMMON LAW MARRIAGE* (1922) 133-137; Note, *Marriage by Mail* (1919) 32 *HARV. L. REV.* 848.

2. The only statute authorizing absentee marriage is Minn. Laws 1945, c. 409 (marriage by proxy allowed for duration of war plus six months). Similar bills have been intro-

absentee marriage, previously a subject for academic legal speculation³ or immigration litigation,⁴ has become a matter of practical inquiry.⁵ Accordingly, it is expected that within the next quarter-century the courts will pass on the legitimacy of these marriages and their offspring.⁶

In wartime, if only to legitimatize children fathered by servicemen before embarkation,⁷ a mechanism for absentee marriage would appear essential.⁸ For lack of such an express mechanism, agencies dealing with members of the armed forces have frequently not done substantial justice to servicemen's dependents.⁹ Albeit the immediate need for a mechanism for ab-

duced in the legislatures of New Jersey (*N. Y. Times*, Mar. 7, 1944, p. 34, col. 1) and Montana (Communication to YALE LAW JOURNAL from J. B. C. Knight, Anaconda attorney, Mar. 4, 1946).

3. See Lorenzen, *Marriage by Proxy and Conflict of Laws* (1919) 32 HARV. L. REV. 473; (1931) 16 IOWA L. REV. 534.

4. See cases cited *infra* notes 100 and 102.

5. See LoLordo, *Proxy and Common Law Marriages* (1943) 1 N.A.L.A.O. BRIEF CASE No. 11, p. 1; Howery, *Marriage by Proxy and Other Informal Marriages* (1945) 13 U. KAN. CITY L. REV. 48. And see COMMITTEE ON WAR WORK. AMER. BAR ASS'N, LAWS ON DOMESTIC RELATIONS IN THE 48 STATES (1944).

6. The only known recorded case involving absentee marriage in an American jurisdiction is *Great Northern Ry. v. Johnson*, 254 Fed. 683 (C. C. A. 8th, 1918) (1919) 32 HARV. L. REV. 848 (marriage by mail sustained). *Ex parte Suzanna*, 295 Fed. 713 (D. Mass. 1924) suggests marriage by proxy was valid at that time in Pennsylvania, but reliance on Pennsylvania law is erroneous, the marriage having been celebrated in Portugal. See note 58 *infra*.

7. The policy of the National Ass'n of Legal Aid Organizations is that assistance in procuring absentee marriage be given "only . . . where there is a definite social need, *i.e.*, pregnancy." LoLordo, *supra* note 5, at 2. The Minnesota statute, cited *supra* note 2, requires a certificate of pregnancy, although a certificate of illegitimate birth has been substituted. Communication to YALE LAW JOURNAL from Richard H. Bachelder, Minneapolis attorney, Feb. 15, 1946. Absentee marriage has been resorted to where a planned marriage was prevented by change in military orders. Reynolds, *supra* note 1, at p. 28, col. 2, and p. 29, col. 2. While in Tunisia, the late Ernie Pyle remarried his wife by proxy after they decided their 8-months-old divorce was a mistake. *Id.*, at p. 29, col. 4. Since cessation of hostilities, absentee marriage has been used to enable foreign brides to secure transportation to the United States [*N. Y. Herald Trib.*, May 11, 1946, p. 3, col. 2 (arrival English proxy bride on Queen Mary)] and American brides to join servicemen overseas (Communication to YALE LAW JOURNAL from J. Ward Arney, Coeur d'Alene, Idaho attorney, Mar. 25, 1946). Schuschnigg was married by proxy while in German custody. *N. Y. Times*, June 4, 1938, p. 17, col. 7, and July 1, 1938, p. 13, col. 1.

8. France, Belgium and Italy authorized marriage by proxy for servicemen in World War I. See Lorenzen, *supra* note 3, at 479. Italy revived the practice during the Ethiopian war (*N. Y. Times*, Oct. 7, 1935, p. 10, col. 6) and introduced radio marriage in World War II (*id.*, Jan. 28, 1942, p. 8, col. 7). France renewed the authorization (*id.*, Sept. 14, 1939, p. 15, col. 2) and permitted such marriage even after death of the groom (*id.*, Mar. 8, 1940, p. 4, col. 7). Hungary authorized the fiancées of soldiers killed in action to assume the status of widows. *Id.*, Mar. 28, 1943, § 1, p. 12, col. 3. Legislation authorizing marriage by proxy was advocated in England. *Id.*, Apr. 4, 1943, § 1, p. 12, col. 5.

9. The policy of the Comptroller General has been to refuse payment of dependency allowance to wives created by absentee marriage unless express authorization for such marriage appears in statute or judicial decision. See decisions cited *infra* note 113.

sentee marriage has passed, judicial validation of those already used seems desirable to clarify the status of persons married in absentia and to facilitate the administration of social measures. Although absentee marriage is without express American precedent,¹⁰ this discussion will seek to postulate legal rationalia for validating such marriage by harmonizing the absentee with more familiar forms of marriage.

ABSENTEE MARRIAGE AS A STATUTORY SOLEMNIZATION

The purpose of American marriage law is to promote familial stability and secure the legitimacy of children.¹¹ In implementing this policy, statutes governing entry into marriage exercise two functions: (1) to establish with *certainly* when the marriage relation is assumed,¹² and (2) to *protect* the public against undesirable or ill-advised marriages.¹³ Certainty is obtained by prescribing formal solemnization before an authorized third person¹⁴ and by procuring publicity¹⁵ and registration.¹⁶ Protection is achieved by requiring, preliminary to solemnization, a license¹⁷ certifying the requisite mental capacity, freedom from disease, parental consent (for minors), and observance of a waiting period; and by prohibiting incestuous, polygamous, and miscegenatic marriages.¹⁸ Under these statutes an absentee marriage may best be upheld when an agent is permitted to substitute for the absentee.¹⁹

10. See note 6 *supra*.

11. See 1 BISHOP, *NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION* (1891) c. 3; 2 SCHOULER, *MARRIAGE, SEPARATION AND DIVORCE* (6th ed. 1921) § 1073.

12. See Cook, *Reform in the Celebration of Marriage* (1888) 61 ATL. MO. 680, 681; 3 HOWARD, *HISTORY OF MATRIMONIAL INSTITUTIONS* (1904) 185 *et seq.*

13. See RICHMOND AND HALL, *MARRIAGE AND THE STATE* (1929) pt. 2.

14. "The exchange of matrimonial consents in the presence of an authorized third person" has been termed the "indispensable" element of marriage statutes. Cook, *Marriage Celebration in the United States* (1888) 61 ATL. MO. 520. And see *Denison v. Denison*, 35 Md. 361, at 379 (1872).

15. Publicity also serves a protective function. See RICHMOND AND HALL, *MARRIAGE AND THE STATE* (1929) c. 8.

16. The Massachusetts Bureau of Vital Statistics suggests eleven reasons for permanent official records of marriage. *Id.* at 294.

17. License is "the initial step of the state in its control of marriage." 1 VERNIER, *AMERICAN FAMILY LAWS* (1931) 46. State supervision of marriage by license devices is considered exhaustively in RICHMOND AND HALL, *MARRIAGE AND THE STATE* (1929). And see 1 VERNIER, *supra* § 17 and cross references.

18. *Id.* §§ 37-47.

19. The Minnesota statute, cited *supra* notes 2 and 7, contains the only explicit authorization for marriage by an agent, although Delaware permits a proxy to procure a license for a person critically ill. REV. DELA. CODE (1935) § 3490. Iowa expressly validates marriage solemnized in a manner other than that prescribed, but the \$50 fine imposed on each person aiding and abetting such marriage deters experimentation. IOWA CODE (1939) § 10437.

A possible alternative is suggested by New York Domestic Relations Law, Sec. 11, Subd. 4, authorizing marriage by written contract. The attorney general of the state rules

The wording of many statutes, however, has been interpreted as contemplating, if not flatly requiring, the personal presence of both parties at license bureau or solemnization.²⁰ Such narrow interpretation seems unnecessary²¹ to satisfy the functional requirements of the marriage statutes, since certainty and protection could be adequately achieved where the license is issued and the ceremony performed upon appropriately acknowledged instruments,²² accompanied, if need be, by affidavits from persons having knowledge of the absentee.²³ Assuming that, by means of these safeguards, the possibility of fraud,²⁴ mistake or duress could be equated between ordi-

the parties must sign in the presence of one another. REP. ATT'Y GEN. (1934) 371. See also *id.* (1933) 448 (license required for contract marriage); and *id.* (1940) 137 (no authority for proxy marriage).

20. See REP. ATT'Y GEN. OF N. DAK. (1940-42) 83; ILL. OPS. ATT'Y GEN. (1943) 119; REP. ATT'Y GEN. OF MICH. (1943-44) 406; REP. ATT'Y GEN. OF MISS. (1941-43) 71. And see tabulation by states, LoLordo, *supra* note 5, at 6-16. In most instances it is immaterial whether the requirement relates to license or solemnization, although a serviceman might conceivably apply in person for a license and be sent overseas before solemnization. Some statutes pose an obstacle by requiring that the blood test be certified by a physician licensed to practice in the state (see 22 ALA. CODE (1940) § 95), or be returned within a period too short for most overseas servicemen [see MO. REV. STAT. ANN. (Cum. Supp. 1945) § 3364-A (15 days allowed)].

21. It is unlikely that many legislatures considered absentee marriage in drafting statutes. But see LA. CIV. CODE (Dart, 1945) § 109 (marriage by procuration prohibited). Where "no scrutiny of [statutory] text can ever evoke additional consequences . . . we must attach them, if at all, because some public policy, adequately revealed, would otherwise be thwarted." Cardozo, J., in *People v. Defore*, 242 N. Y. 13, 23, 150 N. E. 585, 588 (1926). And see 1 BISHOP, *op. cit. supra* note 11, § 163.

22. The necessity for an unambiguously acknowledged power of attorney for the proxy should be obvious. In *Hardy v. McCrae*, C. C. Jackson County, Mo., Docket No. 101474, Dec. 21, 1945, an annulment was granted on an unopposed petition alleging defendant, "pretending to act for . . . plaintiff, . . . went through a pretended marriage ceremony" by proxy while the plaintiff was serving in North Africa. However, marriage by proxy is generally believed invalid in Missouri. Communication to YALE LAW JOURNAL from S. Ralph Stone, Independence attorney, Mar. 19, 1946; LoLordo, *supra* note 5, at 11. Cf. Howery, *supra* note 5, at 81. But see COMMITTEE ON WAR WORK, AMER. BAR ASS'N, LAWS ON DOMESTIC RELATIONS (1944) 67.

23. Colorado penalizes the issuer of a license to a party lacking capacity unless the issuer has taken third-party affidavits. COLO. STAT. ANN. (1935) c. 107, § 7. Oklahoma permits license to issue on affidavit of a responsible person with knowledge of the parties. 43 OKLA. STAT. ANN. (1937), § 5. In New Mexico a person residing more than ten miles from a county seat may procure license by affidavit without personal appearance. N. M. STAT. ANN. (1941) § 65-111. And see 1 VERNIER, AMERICAN FAMILY LAWS (1931) § 31.

24. LoLordo, *supra* note 5, at 2, warns legal advisers arranging absentee marriages to inquire "as to any representations that have been made to the soldier as this may . . . be grounds for annulling the marriage." A clear distinction should be made between fraud in procuring the absentee's proxy and fraudulent representation that a proxy has been procured. See *Hardy v. McCrae*, C. C. Jackson County, Mo., Docket No. 101474, Dec. 21, 1945, cited *supra* note 22. Marriage by proxy should not be confused with fraudulent impersonation, as was done in *N. Y. Times*, Nov. 20, 1935, p. 48, col. 3. And see *Goldman v. Dithrich*, 131 Fla. 408, 179 So. 715 (1938); *Ellis v. Ellis*, 152 Miss. 836, 119 So. 304 (1928).

nary and absentee marriage,²⁵ the absentee marriage so instigated could usually be annulled with less complication than a conventional marriage followed by cohabitation. And even the danger of prior revocation could be disposed of by voiding marriage solemnized in ignorance of revocation, or of the insanity or death of the absentee.²⁶ Dictum to the effect that marriage is too personal an act for performance by an agent²⁷ seems to fail to differentiate between the marital relation and the negotiations leading to marriage, which may not lend themselves to performance by a representative,²⁸ and the ceremony by which marriage is contracted.

Consequently, there appears no cogent reason why the performance by an agent of the purely mechanical functions of a party to the marriage ceremony should be held to contravene statutory requirement.

Another doctrinal basis for upholding absentee marriage exists in states which exempt, from the usual requirements for statutory solemnization, marriage performed according to the customs and usages of a religious denomination or society.²⁹ Such provision was apparently designed to avoid statutory conflict with the Quaker wedding ceremony, and many statutes extend this exemption only to Quakers. In some states, however, the statutory wording is so broad as to offer ground for validating absentee marriage if provided for by a particular sect. Thus, in Nebraska, the statutory provision³⁰

"It shall be lawful for every religious society to join in marriage such persons as are members of the society, according to the rites and customs of the society. . . ."

led to a ruling that absentee marriage is valid in that state only if "performed according to the rites and customs of a religious society of which both contracting parties are members."³¹

The only known religious denomination specifically authorizing absentee

25. But see Lorenzen, *supra* note 3, at 477.

26. As provided in Canon 1091, Code of Canon Law of the Roman Catholic Church. The Roman Catholic authorization of marriage by proxy is discussed *infra* p. 740 and note 32.

27. See 1 MECHEM, AGENCY (2d ed. 1914) § 126. Cf. letter opinion, Attorney General of South Dakota to Vincent LoLordo, July 29, 1943, copy to YALE LAW JOURNAL, Mar. 6, 1946, p. 5: "the essentially personal relationship to be created . . . not being a mere property right, is not one that may be consummated by a representative."

28. As in the case of Miles Standish, principal, and John Alden, agent. ". . . [S]peak for yourself, John." LONGFELLOW, THE COURTSHIP OF MILES STANDISH (1853) pt. 3. In other cultures, the role of an agent in this connection is less circumscribed. Matchmakers betroth and wed unacquainted couples in Persia. 1 WOOD, THE WEDDING DAY IN ALL AGES AND COUNTRIES (1869) 90. The *jus primae noctis* has had wide application. 1 WESTERMARCK, HISTORY OF HUMAN MARRIAGE (1921) c. 5.

29. See 1 VERNIER, AMERICAN FAMILY LAWS (1931) § 24.

30. NEB. REV. STAT. (1943) 42-115.

31. County Judge Charles J. Southard, Omaha, quoted in Gregory, *War Notes* (1943) 29 A. B. A. J. 83.

marriage is the Roman Catholic Church which, in Canons 1089 and 1091 of the Code of Canon Law,³² provides for the solemnization of marriage where a proxy has been authorized by the absentee. Accordingly, an Iowa couple was married by proxy by an Omaha Catholic priest.³³

To validate absentee marriage, another rationale employing these Canons has been developed in New Mexico, where the basic marriage law is Spanish rather than common law.³⁴ It is maintained that the Spanish law reenacted Catholic proxy marriage, and that the marriage statute extended the privilege of solemnizing marriage, including marriage by proxy, to ministers of all denominations and to civil magistrates.³⁵

ABSENTEE MARRIAGE AS A FORM OF COMMON LAW MARRIAGE

In the seventeen jurisdictions recognizing common law marriage,³⁶ absentee marriage appears to satisfy the basic requirement of present mutual

32. Quoted, translated and annotated in AYRINHAC, *MARRIAGE LEGISLATION IN THE NEW CODE OF CANON LAW* (Rev. Ed. 1932) §§ 1089, 1091. The provision dates from the time of Pope Boniface VIII. See Lorenzen, *supra* note 3, at 475.

33. *N. Y. Sunday News*, Sept. 3, 1944, p. 29, col. 2.

34. See opinion of the Attorney General of New Mexico, *Rep. ATT'Y GEN. OF N. M.* (1943-44) 74, citing *In re Gabaldon*, 38 N. M. 392, 34 P. (2d) 672 (1934). The Attorney General's opinion does not refer to the religious usage exemption, extended to "any religious society." N. M. STAT. ANN. (1941) § 65-103.

35. The argument is potentially applicable in any states formerly Spanish or Mexican. However, holdings as to the basic law in these states are in confusion. *In re Gabaldon*, 38 N. M. 392, 34 P. (2d) 672 (1934) held that the Canons of the Council of Trent abrogating Catholic recognition of consensual, but not proxy, marriage in 1563 (see Lorenzen, *supra* note 3, at 476) had been extended to the Spanish colonies in this continent. *Hallett v. Collins*, 10 How. 174 (1850) held *contra* in construing Louisiana law. The *Hallett* decision has, however, been challenged as historically erroneous. Memorandum by Thayer, quoted at length by Sadler, J., dissenting in the *Gabaldon* case, *supra*, at 412, 34 P. (2d) at 685. The California view is similar to that of the *Hallett* decision, *supra*. See 16 Cal. Jur. 914 and cases cited. Texas and Arizona courts appear to have held that the common law of marriage superseded the Mexican law. See *Grigsby v. Reib*, 105 Tex. 597, 600, 153 S. W. 1124, 1125 (1913); *United States v. Tenney*, 2 Ariz. 127, 133, 11 Pac. 472, 474 (1886).

An analogous line of argument in common law states would be that marriage by proxy existed at English common law (Lorenzen, *supra* note 3, at 480) and, in the absence of express prohibition, remains valid so long as other provisions of the statute are complied with. However, the English historical argument lacks the concrete continuity evidenced by Canon 1089, and, if the colonists imported the practice into this country, it has escaped record.

36. LoLordo, *supra* note 5, lists eighteen common law marriage jurisdictions: Alabama, Colorado, the District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Michigan, Mississippi, Montana, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Texas. The Pennsylvania courts have since virtually abolished common law marriage by refusing to recognize it in the absence of license. *Fisher v. Sweet & McClain*, 154 Pa. Super. 216, 35 A. (2d) 756 (1944). In 1915, 28 jurisdictions were believed to recognize common law marriage. Note, L. R. A. 1915E 8, 17. Various tabulations are collected, 1 VERNIER, *AMERICAN FAMILY LAWS* (1931) 106.

consent³⁷ to be husband and wife immediately.³⁸ In seven of these states, it is maintained that some form of absentee marriage is valid, but in the remaining jurisdictions the common law marriage doctrine has been so confused in application that validation of absentee marriage is considered unlikely.³⁹ This confusion stems from an indiscriminate application of the doctrine to two essentially different fact situations: (1) where a couple live together following a *consensual* marriage (i.e., without ceremony other than an agreement to be husband and wife);⁴⁰ and (2) where a *ceremonial* marriage is *defective* either for non-compliance with statutory formality⁴¹ or because one party was under a disability, since removed.⁴² The language of the courts makes no express distinction between these situations, although an inarticulate distinction is indicated by the tendency to approve the common law marriage doctrine more readily where the case of first impression arises on a defective ceremonial marriage.⁴³

Since the consensual and defective ceremonial marriages involve antithetical policies, validation of absentee marriage will in part depend upon the situation with which the absentee marriage is associated. Inasmuch as the consensual marriage thwarts the efforts of statute to achieve certainty and protection, contributes to immorality, invites fraud, and hampers

37. See MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) § 22; 2 Schouler, *op. cit. supra* note 11, c. 12. The classic formulation required either an agreement *per verba de praesenti* or *per verba de futuro cum copula*. See 1 HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS (1904) 336-340; 2 Kent Comm. (14th ed. 1896) *87. The *futuro* marriage has never been recognized in this country. MADDEN, *supra*, at 58. The distinction in tenses makes more sense in the Latin in which it was formulated. See Martin Luther's acrid commentary, quoted 1 HOWARD, *supra*, at 341.

38. If the parties contemplate some future act, such as a ceremony, before they are "really married," the agreement does not constitute marriage. See *Van Tuyl v. Van Tuyl*, 57 Barb. Sup. 235, 238 (N. Y. 1869); 1 BISHOP, *op. cit. supra* note 11, § 364.

39. The states in which validity of absentee marriage appears probable are Idaho, Montana, South Dakota, Kansas, Oklahoma, Pennsylvania and Florida. See discussion *infra* pp. 744-8. Compare LoLordo and Howery, both *supra* note 5. The probable invalidity of absentee marriage in Georgia is less certain than either of the above writers presumes. A serviceman's absentee marriage contract was admitted to record, Bk. 1469, p. 83, Clerk Sup. Ct., Fulton County, Ga. Communication to YALE LAW JOURNAL from Attorney General of Georgia, Apr. 10, 1946.

40. See, e.g., *Dyer v. Brannock*, 66 Mo. 391 (1877); *in re Love's Estate*, 42 Okla. 478, 142 Pac. 305 (1914).

41. See cases cited *infra* note 46.

42. Such was the fact situation in *Fenton v. Reed*, 4 Johns. Rep. 52 (N. Y. 1809) which became the leading precedent for common law marriage. See also, e.g., *Teter v. Teter*, 101 Ind. 129 (1885); *Conn v. Conn*, 2 Kan. App. 419, 42 Pac. 1006 (1895).

43. The leading cases are collected in KOEGEL, COMMON LAW MARRIAGE (1922) cc. 6, 7 and MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 51, n. 37, and 53, n. 38. Additional cases are *In re Gabaldon*, 38 N. M. 392, 34 P.(2d) 672 (1934); *State ex rel. Felson v. Allen*, 129 Conn. 427, 29 A.(2d) 306 (1942); *Roberts v. Roberts*, 58 Wyo. 438, 133 P.(2d) 492 (1943). A brief analysis indicates 14 of 32 initial cases favoring the common law marriage doctrine arose on consensual marriages, while such marriage gave rise to 10 of 17 initial cases rejecting the doctrine.

the work of administrative and social agencies,⁴⁴ association of the social stigma⁴⁵ of the consensual marriage with absentee marriage may lead to rejection of the latter as opposed to public policy. On the other hand, use of the common law marriage doctrine to sustain a defective ceremonial marriage implements the policy to promote marital stability and to avoid illegitimacy by preserving a flexibility of circumstances in which the courts can sustain a worthwhile marriage.⁴⁶ In this context, policy considerations predicate sustaining absentee marriage. And the absentee marriage appears to fall factually within the category of defective ceremonial marriage, since the parties predicate marriage on a ritual which expresses a clear intent to marry, and is suitable for public record.

Even in jurisdictions not now recognizing common law marriage, courts might be willing to uphold the absentee as a defective ceremonial marriage, if steered away from the old syntax of common law marriage, based on consensual marriage cases.⁴⁷

An additional impediment to absentee as a form of common law marriage

44. See RICHMOND AND HALL, *MARRIAGE AND THE STATE* (1929) at 29-30; 3 HOWARD, *op. cit. supra* note 37, at 101-4. And see *Roberts v. Roberts*, 58 Wyo. 438, 465-7, 133 P.(2d) 492, 501-3 (1943) and cases cited.

45. "According to popular view, common law marriage simply means living in adultery." KOEGEL, *COMMON LAW MARRIAGE* (1922) 4 Family 172. "The term 'common law wife' . . . is a synonym for a woman who, having lived in a state of concubinage with a man . . . seeks (to share) in the proceeds of his property." *In re Brush*, 25 App. Div. 610, 613, 49 N. Y. Supp. 803, 806 (1898). "So-called common law marriage contravenes public policy and should not be accorded any favor." *In re Redman*, 135 Ohio St. 554, 558, 21 N. E. (2d) 659, 661 (1939). The states "should abolish common law marriage. The great weight of modern opinion sustains this contention." 1 VERNIER, *AMERICAN FAMILY LAWS* (1931) 108.

46. The functional utility of the common law marriage doctrine was greatest in the nineteenth century. The legal approach of the day invalidated marriage not conforming to every detail of the statute if the statute were construed as *mandatory* (*i.e.*, prescribing the *only* form for contracting marriage). On this theory, marriages were attacked on trivial grounds. See, *e.g.*, *Londonderry v. Chester*, 2 N. H. 268 (1820) (minister not settled over a regular parish); *Pearson v. Howey*, 11 N. J. L. Rep. 12 (1829) (justice of the peace crossed county line); *Campbell's Admr. v. Gullatt*, 43 Ala. 57 (1869) (license issued by clerk without authority); *Hutchins v. Kimmell*, 31 Mich. 126 (1875) (marriage certificate did not specify compliance with statute). By construing the statute as *directory* (*i.e.*, not excluding other forms of marriage), courts were able to sustain as valid at common law marriage defective in compliance with statute. Today, marriages entered into in good faith but defective in purely formal respects are protected by statute [see 1 VERNIER, *AMERICAN FAMILY LAWS* (1931) § 25] or judicial amelioration of the mandatory doctrine [see 2 SCHOULER, *op. cit. supra* note 11, at §§ 1201, 1217; MADDEN, *op. cit. supra* note 37, at § 23], and the children of marriages null in law are generally legitimated by statute [see 1 VERNIER, *supra* at § 48; Note (1933) 84 A. L. R. 499].

47. *In re Gabaldon*, 38 N. M. 392, 396, 34 P.(2d) 672, 675 (1934) criticizes common law marriage because of ". . . the ease with which a mere adulterous union may become, in the mouths of interested and unscrupulous witnesses, a common law marriage." To the same effect, see *Fisher v. Sweet & McClain*, 154 Pa. Super. 216, 226, 35 A.(2d) 756, 761 (1944) quoted *infra* note 89. The objection, while applicable to a consensual marriage, seems groundless in the case of a defective ceremonial or an absentee marriage.

is the requirement, in some jurisdictions, of cohabitation to prove mutual consent.⁴⁸ While doubtless of evidentiary value in establishing an intent to assume the duties and obligations of matrimony in a consensual marriage,⁴⁹ this requirement appears unnecessary in a defective ceremonial marriage, where other external evidence of agreement to marry is available.⁵⁰ As applied to service-separated couples married in absentia, the requirement is especially unreasonable in view of the clear and publicly expressed intent to assume the marital status immediately, on the same basis as conventionally-married couples separated by war.

A less common obstacle to absentee marriage is the occasional statement that the consents requisite to common law marriage must be repeated by the parties in the presence of one another.⁵¹ The dictum, while traceable to Lord Cranworth in *Campbell v. Campbell*,⁵² is sometimes grounded in unconventional translation of the phrase *per verba de praesenti*,⁵³ or in misquotation of American decisions⁵⁴ and thus appears inaccurate or inadequate.

A logical approach to absentee marriage is exemplified in the only reported case involving absentee marriage within American jurisdictions, *Great Northern Railway v. Johnson*,⁵⁵ which rejected the requirements of both presence

48. According to LoLordo, *supra* note 5, cohabitation is clearly not required in only five common law marriage states (Georgia, Kansas, Ohio, Oklahoma and Pennsylvania).

49. Because consensual marriage cases most often arise after the death of one or both parties, direct evidence of the agreement may be lacking, or testimony to an unwitnessed agreement may be given by an interested party. Consequently, evidence of cohabitation, holding out as husband and wife, and general reputation among the neighbors is frequently pertinent to establish the existence and nature of the agreement. For a concise evaluation of evidence in consensual marriage cases, see *In re Estate of Lust*, 186 Minn. 405, 408-9, *sub. nom.* Ghelin v. Johnson, 243 N. W. 443, 444-6 (1932). But many cases confuse what is necessary to *create* and what may be used to *prove* a marriage. See KOEGEL, COMMON LAW MARRIAGE (1922) 131, 151.

50. But see the argument in *Grigsby v. Reib*, 105 Tex. 597, 153 S. W. 1124 (1913) that the cohabitation requirement is more logical in that the rights of the parties arise out of the status of husband and wife, which begins on assumption, not on contract. (The fact that the parties apparently consorted only in a brothel may have influenced the court's reasoning). Cf. *Herd v. Herd*, 194 Ala. 613, 69 So. 885 (1915) where deceased went through a ceremonial marriage with a woman already pregnant, in the presence of her father. The marriage was declared invalid under the statute because the license was improperly issued, and at common law because there was no subsequent cohabitation.

A serviceman's absentee marriage might be brought within the rule of the *Grigsby* case if assumption of the marital status can be satisfied without physical cohabitation, but appears to be invalid under the *Herd* decision.

51. See REP. ATT'Y GEN. OF FLA. (1943-44) 489 and note 93 *infra*.

52. L. R. 1 H. L. Sc. App. Cas. 182, at 199 (1867).

53. See letter opinion of Attorney General of Indiana to Edward E. Odom, solicitor, Veteran's Administration, July 3, 1944, copy to YALE LAW JOURNAL, Mar. 6, 1946: "If the contract be made through the words of those present, it amounts to a valid marriage."

54. As in 18 R. C. L. 391, 392, citing *Peck v. Peck*, 12 R. I. 485 (1880). The only applicable passage in the cited case occurs at 488, and refers to the parties consenting "to be husband and wife *presently*" (*i.e.*, immediately, forthwith).

55. 254 Fed. 683 (C. C. A. 8th, 1918), (1919) 32 HARV. L. REV. 848. Other reported

and cohabitation, and held squarely that a valid marriage can be contracted by mail. The parties exchanged a written contract of marriage while located in Minnesota and Missouri, both jurisdictions recognizing common law marriage without requirement of cohabitation.⁵⁶ The court, applying contract principles,⁵⁷ ruled that an offer had been transmitted from Minnesota and accepted in Missouri. The contract being thus executed in Missouri, the validity of the marriage was determinable by the laws of that state. The court found nothing in the Missouri law beyond the requirement of present mutual consent, and held the marriage valid; adding, the same result would be reached by applying Minnesota law.⁵⁸ This decision, in theory, would appear to sustain any of the forms of absentee marriage, so long as the written contract were accepted, or the ceremony performed, in a jurisdiction recognizing common law marriage as complete upon exchange of consents.

However, as a practical matter, rationalia in support of absentee marriage as a form of common law marriage must be adapted in each jurisdiction to peculiarities of local doctrine, as illustrated by the devices adopted in the seven common law marriage states apparently most apt to validate absentee marriage⁵⁹—Idaho, Montana, South Dakota, Kansas, Oklahoma, Pennsylvania and Florida.

In Idaho, Montana and South Dakota, absentee marriage is possibly valid under statutory provision for creation of marriage by mutual assumption of the marital status,⁶⁰ which may be evidenced, in the latter two states, by a formal written declaration of marriage.⁶¹

The Idaho statute provides that

"Consent alone will not constitute marriage; it must be followed by a solemnization or by mutual assumption of marital rights, duties or obligations."

cases adjudicate marriages by proxy celebrated in a foreign country. See the immigration cases, *infra* notes 100 and 102; *Hardin v. Davis*, 30 Ohio O. 524 (C. P. Hamilton County 1945) (Mexican proxy marriage).

56. Both states have since abolished common law marriage MO. REV. STAT. ANN. (1939) § 3364; MINN. STAT. (1941) § 517.01.

57. The contractual concept of marriage permeates American law [see 1 VERNIER, AMERICAN FAMILY LAW (1931) § 14], but is seldom so literally applied. *Cf.* *Carmichael v. State*, 12 Ohio St. 553, at 559 (1861) (distinction drawn between "executory" and "executed" marriage contract).

58. This portion of the decision caused the court in *Ex parte Suzanna*, 295 Fed. 713 (D. Mass. 1924) to rely on Pennsylvania law to validate marriage of a resident of that state celebrated by proxy in Portugal, in violation of the principle that the law of the place of celebration controls. RESTATEMENT, CONFLICT OF LAWS (1934) §§ 121, 124. See criticism of the *Suzanna* decision on these grounds, Note (1924) 33 YALE L. J. 777. For similar confusion, see *In re Lum Lin Ying*, 59 Fed. 682 (D. Ore. 1894).

59. See *supra* note 39.

60. The statutes are IDAHO CODE ANN. (1932) § 31-201; MONT. REV. CODE (1935) § 5695; S. D. CODE (1939) § 14.0101. A similar provision in the California code was deleted in 1895. See 16 Cal. Jur., Marriage § 11; CAL. CIV. CODE (Deering 1941) § 55.

61. MONT. REV. CODE (1935) §§ 5724-26. S. D. CODE (1939) §§ 14.0120, 14.0121.

On the basis of the Idaho statute, the validity of marriage by proxy has been

“predicated upon (a) statutory medical examinations, (b) license and (c) ceremony; all bottomed upon executed and acknowledged power of attorney from the absentee party and written contract contemplating the marriage by proxy.”⁶²

Marriages by proxy entered into in Idaho in accordance with this opinion have been accepted by the military services for the purpose of family allowance.⁶³

The Montana and South Dakota statutes are substantially identical with that of Idaho, the Montana statute substituting the phrase “mutual and public assumption of the marital relation.” In Montana, judicial decisions indicate that an “open and notorious” living together is necessary to constitute mutual assumption, in the absence of a written declaration.⁶⁴ In South Dakota, marriage by proxy has been regarded as unfeasible because of the license and physical examination requirements,⁶⁵ but it has been suggested that the requirement of mutual assumption may be satisfied where the parties to a serviceman’s absentee marriage, contracted by writing or other means of communication, conduct themselves “in such manner as will give rise to full and undivided repute that they are husband and wife.”⁶⁶

The statutory declaration of marriage in South Dakota and Montana is an instrument filed in lieu of a marriage certificate, but has been used during the war as a vehicle for the creation of absentee marriage.⁶⁷ It is not clear whether such a declaration would, in and of itself, be accepted as creating a valid marriage.⁶⁸ Construing the statutes as a whole, it is maintainable that the declaration is no more than evidence, suitable for public record, of a pre-

A similar section in the California code was deleted in 1895. 16 Cal. Jur. 916; CAL. CIV. CODE (Deering 1941) § 75, although where record of a marriage has been lost, a declaration by the parties is admissible to record. *Id.* at §§ 76-7.

62. Opinion of J. Ward Arney, Committee on War Work, Idaho State Bar, to Committee on War Work, Amer. Bar Ass’n, Feb. 25, 1944, copy to YALE LAW JOURNAL, Mar. 6, 1946.

63. Communication to YALE LAW JOURNAL from J. Ward Arney, Mar. 6, 1946.

64. Communication to YALE LAW JOURNAL from Attorney General of Montana, Mar. 7, 1946.

65. Letter opinion to Vincent LoLordo from Attorney General of South Dakota, July 29, 1943, copy to YALE LAW JOURNAL, Mar. 6, 1946, p. 5.

66. *Id.* at 3, citing Svendsen v. Svendsen, 37 S. D. 353, 158 N. W. 410 (1916).

67. Communication to YALE LAW JOURNAL from Attorney General of Montana, Mar. 7, 1946. A Montana declaration was held not to establish lawful wife for purposes of officer’s dependency allowance by the Comptroller General. Decision B-46689, Feb. 13, 1945. However, the decision applied the law of the serviceman’s residence, Kentucky, on reasoning analogous to that by which the Missouri law controlled in the *Great Northern* case.

68. See Attorney General of South Dakota, *supra* note 65, at 4: “When such declaration has been made at the time of, or after the fact of, a common law marriage, it is an authentication thereof, and, as between the parties, I think conclusive. Nevertheless as affecting third parties the essential *a priori* facts of a contract ‘per verba in praesenti’ and assumption of marital rights etc., would have to be independently established. . . .”

existing or simultaneous marriage created by consent and mutual and public assumption.⁶⁹

Kansas requires no physical examination prior to marriage, issues a license on application of "any person legally entitled to" one, and the statute contains no requirement of presence.⁷⁰ Furthermore, the Kansas courts have shown no disposition to espouse a flat requirement of cohabitation, but "the decisions take it for granted that some measure of publicity is a distinguishing feature if not an essential attribute of a common law marriage."⁷¹ The critical factor, "measure of publicity," serves as a check on fraudulent claims of secret marriage advanced long after the date,⁷² and would appear to present no obstacle to the validity of marriage by proxy or by written contract publicly proclaimed. The Attorney General of the State, in a formal opinion,⁷³ has postulated the validity of marriage by proxy both on the theory that such was recognized at English common law,⁷⁴ and the reasoning of the *Great Northern* case.

Oklahoma issues a license on the sworn application of a person having knowledge of the facts, has no apparent requirement of presence in the marriage statute,⁷⁵ and, prior to 1945, required no health certificate.⁷⁶ The Oklahoma courts have held that marriage arises on the contract, without the necessity of the parties holding themselves out as husband and wife or professedly living together in that relation.⁷⁷ Marriages by proxy have been

Marriage by declaration was rejected in the only recorded Montana case, *State v. Newman*, 66 Mont. 180, 213 Pac. 805 (1923), when advanced as defense to rape. The court apparently considered the declaration as an attempt to create a marriage at the date of the offense, when the parties did not deem themselves married. The reasoning of the dissent "had a better grasp of the whole case . . . and would be adopted by our Supreme Court at the present time." Attorney General of Montana, *supra* note 67. Cf. *Toon v. Huberty*, 104 Cal. 260, 37 Pac. 944 (1894), where a similar declaration was held invalid because the parties had previously agreed never to assume the marital status or cohabit.

69. See notes 64 and 65 *supra*. A sample "Declaration and Contract of Marriage" furnished by the Attorney General of Montana contains the phrase ". . . we mutually declare that we are married and are husband and wife and have been since (date), on which day we contracted and agreed between ourselves to be and were married." Similarly, a specimen "Contract for Ceremonial Marriage" prepared by J. Ward Arney (*supra* note 62) for Idaho proxy marriages reads, "having heretofore entered into an oral contract of marriage and consummated such marriage, resulting in the . . . birth of . . . a child."

70. The Kansas marriage statute is c. 23, art. 1, KAN. GEN. STAT. (1935).

71. *Butler v. Butler*, 130 Kan. 186, 190, 285 Pac. 627, 629 (1930).

72. In the *Butler* case, 130 Kan. 186, 285 Pac. 627 (1930), the parties to an alleged secret common law marriage entered into seventeen years before sought to set aside a mortgage foreclosure title on the grounds the "wife" had not signed the mortgage.

73. Cited by LoLordo, *supra* note 5, at 9-10.

74. See note 35 *supra*.

75. The Oklahoma marriage statute is 43 OKLA. STAT. ANN. (1941).

76. See 43 OKLA. STAT. ANN. (Cum. Supp. 1945) § 31 *et seq.* Under certain conditions, the Judge of a County Court may dispense with the requirement. *Id.* § 32.

77. See *Mudd v. Perry*, 108 Okla. 168, 173, 235 Pac. 479, 483 (1925); *Tiuna v. Willmott*, 162 Okla. 42, 43, 19 P.(2d) 145, 146 (1933), and cases cited. The Oklahoma courts,

performed,⁷⁸ but without official encouragement.⁷⁹ Written contracts of marriage have been signed before a magistrate and witnesses by proxies for both parties.⁸⁰ However, the Comptroller General has refused to authorize the payment of dependency allowance to wives created by absentee marriage in either Kansas⁸¹ or Oklahoma,⁸² for lack of specific authorization by statute or judicial decision.

The Pennsylvania requirement that both parties must appear to secure a license is deemed to obviate marriage by proxy.⁸³ Prior to 1944, it was believed that absentee marriage could be contracted by mail,⁸⁴ on the authority of *Ex parte Suzanna*⁸⁵ and by the use of cohabitation as an alternative method of proof of intent to marry in the Pennsylvania decisions.⁸⁶ A Pennsylvania mail marriage was approved by the Comptroller General for purposes of dependency allowance.⁸⁷ In 1944, the Pennsylvania Superior Court, in a judicial rider attached to the decision in *Fisher v. Sweet & McClain*,⁸⁸ served notice that the court would not recognize common law marriage entered into after the date of the decision unless preceded by license.⁸⁹

however, stress legitimacy of children as the policy behind recognition of common law marriage. *Ibid.*; *In re Love's Estate*, 42 Okla. 478, 485, 142 Pac. 305, 308 (1914).

78. See Howery, *supra* note 5, at 92.

79. The policy of the Attorney General of Oklahoma is not to encourage marriage other than in conformity with statute. Communication to YALE LAW JOURNAL, Mar. 6, 1946. The War Work Committee of the State Bar Ass'n has expressed the opinion marriage by mail is probably valid (Opinion to Lt. Gordon H. Shumard, Jan. 26, 1946, copy to YALE LAW JOURNAL, Mar. 6, 1946) but declines to go on record as to proxy marriage. Communication to YALE LAW JOURNAL from H. T. Tumilty, chairman, Mar. 6, 1946.

80. *N. Y. Sunday News*, Sept. 3, 1944, p. 29, col. 5. These marriages were not accepted by any of the service-connected agencies (Office of Dependency Benefits, Comptroller-General, and Veterans Administration) for payments to servicemen's dependents. Communication to YALE LAW JOURNAL from James B. Diggs, Jr., chairman, Legal Aid Committee, Tulsa Bar Ass'n, Apr. 30, 1946.

81. Decision B-52248, Nov. 26, 1945.

82. Decision B-49442, June 13, 1945.

83. LoLordo, *supra* note 5, at 14, citing 48 PA. STAT. § 5 (Purdon 1930); And see Communications to Nat'l Ass'n of Legal Aid Organizations, 1 N. A. L. A. O. BRIEF CASE No. 4, at 6, 1 *id.*, No. 6, at 6-7.

84. See communications cited *supra* note 83. The Philadelphia Legal Aid Society proposed an acknowledged agreement to be recorded by the Recorder of Deeds.

85. 295 Fed. 713 (D. Mass. 1924). See note 58 *supra*.

86. See *In Re McGrath's Estate*, 319 Pa. 309, 179 Atl. 599 (1935).

87. Decision B-41254, June 24, 1944. The Pennsylvania State Dep't, however, declared the marriage not valid. *N. Y. Sunday News*, Sept. 3, 1944, p. 28, col. 3.

88. 154 Pa. Super. 216, 35 A.(2d) 756 (1944); 18 TEMP. L. Q. 264. The portion of the opinion announcing future non-recognition of common law marriage appears at 224, 35 A. (2d) at 759, after the case at bar had been determined. See criticism on this point, *Pen Common Law Marriages in Pennsylvania* (1945) 49 DICK. L. REV. 94.

89. The court, at 226, 35 A.(2d) 761, expressed a purpose to "establish a present intent on the part of the applicants to be married, and not merely an intent to have sexual relations," but placed main reliance on the necessity of such a ruling to implement the Marriage License Act of 1939 [48 PA. STAT. (Purdon, Cum. Supp. 1945) §§ 20-4, repealed and super-

As a result, the Comptroller General has refused to recognize Pennsylvania mail marriages contracted after that date.⁹⁰

In Florida, although the validity of common law marriage in the absence of cohabitation is considered doubtful,⁹¹ the Attorney General rules⁹² that marriage by telephone is valid, but marriage by proxy is invalid because presence is necessary at common law.⁹³ Satisfaction of a presence requirement by telephone marriage appears inconsistent with the reluctance of the courts to approve oaths and acknowledgments by telephone.⁹⁴

ABSENTEE MARRIAGE AND CONFLICT OF LAWS

Unless odious to public policy or contrary to positive law, a marriage valid where celebrated is valid everywhere,⁹⁵ even though the parties resort to the

sessed, 35 PA. STAT. (Purdon, Cum. Supp. 1945) § 587.6] requiring a pre-marital blood test. The legislature, however, expressly refused to abolish common law marriage in 1941 and 1943. See Notes (1941) 15 TEMP. L. Q. 541, (1944) 18 TEMP. L. Q. 264, 267.

90. Decision B-45639, Dec. 19, 1944. The Pennsylvania legal aid societies ceased assistance in procuring mail marriages after the court's decision. See J. Adv. Gen., Legal Assistance Memo. No. 18, Aug. 10, 1944, § 2, quoted (1944) 2 N. A. L. A. O. BRIEF CASE 70.

91. See LoLordo, *supra* note 5, at 8, citing *Chaves v. Chaves*, 79 Fla. 602, 84 So. 672 (1920). But the court in that case, at 614, 84 So. at 676, said "it is not essential to require 'cohabitation and repute' . . . though . . . often resorted to as evidence. . . ."

92. REP. ATT'Y GEN. (1943-44) 489.

93. Citing *Marsicano v. Marsicano*, 79 Fla. 278, 84 So. 156 (1920). The presence requirement is scarcely dictum in that case, being included in a page-long definition of common law marriage at 284, 84 So. at 158, from 18 R. C. L. 391, 392, which is clearly erroneous on that point. See note 54 *supra*.

94. See *Hutchinson v. Stone*, 79 Fla. 157, 84 So. 151 (1920) (acknowledgement by telephone held not presence before notary). *Accord*: *Oswald v. Newbanks*, 336 Ill. 490, 168 N. E. 340 (1929); *Southern State Bank v. Sumner*, 187 N. C. 762, 122 S. E. 848 (1924); *Myers v. Eby*, 33 Idaho 266, 193 Pac. 77 (1920); *Wester v. Hurt*, 123 Tenn. 508, 130 S. W. 842 (1910). *Contra*: *Wooten v. Farmer's and Merchant's Bank*, 158 Ark. 179, 249 S. W. 569 (1923); *Banning v. Banning*, 80 Cal. 271, 22 Pac. 210 (1889). Oaths and affidavits by telephone are generally invalid. *In re Napolis*, 169 App. Div. 469, 155 N. Y. Supp. 416 (1915); *Carnes v. Carnes*, 138 Ga. 1, 74 S. E. 785 (1912); *Sullivan v. First Nat'l Bank*, 37 Tex. Civ. App. 228, 83 S. W. 421 (1904). *Contra*: *Kuhn v. St. Joseph*, 234 S. W. 353 (Mo. App. 1921). The Attorney General of Missouri has refused to authorize telephone marriage in that state. *N. Y. Times*, Oct. 6, 1942, p. 44, col. 4. However, telephone marriages have been performed in Mississippi (*N. Y. Sunday News*, Sept. 3, 1944, p. 29, col. 1), Kansas (*id.* p. 29, col. 2) and Indiana (*N. Y. Times*, July 29, 1945, § 1, p. 37, col. 4).

95. See RESTATEMENT, CONFLICT OF LAWS (1934) §§ 121-32. And see Taintor, *Effect of Extra-State Marriage Ceremonies* (1938) 10 MISS. L. J. 105. A proxy marriage is deemed celebrated where the ceremony takes place. RESTATEMENT, CONFLICT OF LAWS (1934) § 124. The same rule would appear to apply to a proxy-signed contract wedding. The place of celebration of a mail marriage is ascertained by construing the second party's acknowledgment as acceptance of an offer initiated by the first party, the contract being complete in the jurisdiction of acceptance, in accordance with the rule in *Adams v. Lindsell*, 1 Barn. & Ald. 681 (K. B. 1818). See *Great Northern Ry. Co. v. Johnson*, 254 Fed. 683 (C. C. A. 8th, 1918). It might seem that a telephone marriage is celebrated where the minister is located, but this principle is less attractive where the couple is together and the minister the absentee. See *N. Y. Times*, June 11, 1938, p. 17, col. 7.

place of celebration to evade the provisions of the law in the state of domicile.⁹⁶ This principle is peculiarly important to absentee marriage, because of the frequency with which parties domiciled elsewhere have had recourse to a state where absentee marriage is believed valid.⁹⁷ Thus, at least two marriages of American servicemen overseas to girls at home, solemnized by proxy in Mexico, neither party being present, have recently been sustained.⁹⁸ On this same principle, it has been held that the Louisiana prohibition of marriage by proxy does not invalidate marriage of a Louisiana resident to a person in a jurisdiction authorizing such marriage, since the prohibition applies only to marriages solemnized within the state;⁹⁹ and the Federal courts have sustained marriage performed by proxy in a country authorizing such marriage, where the absentee was a resident of the United States and his spouse sought admission as a non-quota or illiterate immigrant.¹⁰⁰

The present scope of the principle has been criticized as hindering effective implementation of the protective function where the parties seek to evade such police restrictions as premarital physical examination, waiting period, and parental consent.¹⁰¹ This criticism should not, however, apply to absentee marriage of servicemen, the permissibility of which depends purely on the forms required to create a marriage.

96. See *Van Voorhis v. Brintnall*, 86 N. Y. 18 (1881); *Loth v. Loth's Estate*, 54 Colo. 200, 129 Pac. 827 (1913).

97. See O'Neill, *supra* note 1. In only one or two of approximately thirty proxy-signed contract marriages in Tulsa, Okla., were either of the parties residents of Oklahoma. Communication to YALE LAW JOURNAL from James B. Diggs, Jr., chairman, Legal Aid Committee, Tulsa County Bar Ass'n, Apr. 30, 1946.

98. *Hardin v. Davis*, 30 Ohio O. 524, (C. P. Hamilton County, 1945); *Commonwealth v. Edington*, Phila. Munic. Ct., Mar. 1, 1945, *N. Y. Times*, Mar. 2, 1946, p. 15, col. 7. In the latter case, however, the court declined to pass on the validity of the marriage other than to negative criminal intent in a fornication proceeding. *Accord: Commonwealth v. Munson* 127 Mass. 459 (1879) (invalid marriage held defense to prosecution for lewd and lascivious cohabitation).

Stern, *Marriages by Proxy in Mexico* (1945) 19 So. CALIF. L. REV. 109, at 116 suggests that proxy marriage of Americans in Mexico may be subject to annulment there for violation of the domiciliary requirements.

99. *U. S. ex rel. Modianos v. Tuttle*, 12 F. (2d) 927 (E. D. La. 1925) (proxy marriage in Turkey). Cf. *Shea v. Shea*, 294 N. Y. 909, 63 N. E. (2d) 113 (1945) *rev'ing* 268 App. Div. 677, 52 N. Y. Supp. (2d) 756 (2d Dep't 1945), 45 Col. L. REV. 457, 14 FORDHAM L. REV. 93. The Columbia note erroneously treats the Appellate Division decision as giving extraterritorial application to the statute abolishing common law marriage, although a majority on both courts denied extraterritorial application.

100. The leading case is *Ex parte Suzanna*, 295 Fed. 713 (D. Mass. 1924), 33 YALE L. J. 777, discussed note 58 *supra*. See also *Kane v. Johnson*, 13 F. (2d) 432 (D. Mass. 1926); *U. S. ex rel. Modianos v. Tuttle*, 12 F. (2d) 927 (E. D. La. 1925); *U. S. ex rel. Aznar v. Commissioner of Immigration*, 298 Fed. 103 (S. D. N. Y. 1924). *Contra: In re Lum Lin Ying*, 59 Fed. 682 (D. Ore. 1894). Since 1924, Federal statute prohibits recognition of proxy or picture marriages for immigration purposes. 43 STAT. 153 (1924), 8 U. S. C. § 224(m) (1940), *Silva v. Tillinghast*, 36 F. (2d) 801 (D. Mass. 1929). A transoceanic telephone marriage has been used to evade the statute. See *N. Y. Times*, Dec. 3, 1933, § 2, p. 5, col. 2.

101. RICHMOND AND HALL, MARRIAGE AND THE STATE (1929) 194 *et seq.*

A practical problem posed by extra-territorial recourse to the absentee marriage is that the validity of such marriage may be determined in a jurisdiction other than that of celebration before the courts of the celebrating jurisdiction have passed on the question. This raises the issue of the weight which must be accorded the *lex loci contractu* in the forum state. The courts have thus far shown a tendency toward stringency in requiring proof that the law of the place of celebration permits absentee marriage,¹⁰² but, at least in jurisdictions friendly to the common law marriage, have tended toward lenience where a common law marriage in another jurisdiction is alleged.¹⁰³

ABSENTEE MARRIAGE AND ADMINISTRATIVE AGENCIES

Prior to the expansion of governmental social services, couples were seldom required to prove the validity of their marriage, and litigation of the validity of a marriage irregularly formed was infrequent.¹⁰⁴ Workmen's Compensation and Social Security acts, attaching money value to the status of widow in social strata where inheritance was formerly of insufficient magnitude to justify litigation,¹⁰⁵ and the servicemen's dependent's support laws of the two World Wars,¹⁰⁶ requiring proof of marriage by every serviceman claiming family allowance, have given rise to more common law marriage adjudications than formerly appeared in all the recorded cases.¹⁰⁷ Thus far, war-time absentee marriage has not caused significant judicial litigation.¹⁰⁸ But during the war the administrative load involving such marriage has been, perhaps, at its peak. Every serviceman's absentee marriage required an attempt by some administrative official to predict judicial reaction in the jurisdiction of celebration, in order to determine existence of a "lawful wife" for payment of family allowance, pension, or insurance benefits,¹⁰⁹ under liability of personal restitution of funds wrongfully paid out.¹¹⁰ Because of

102. See *Cosulich Societa Triestina di Navigazione v. Elting*, 66 F. (2d) 534, 536 (C. C. A. 2d, 1933) (Italy); *Hawaii v. Li Shee*, 12 Hawaii 329, 330 (1900) (China). But see *Great Northern Ry. Co. v. Johnson*, 254 Fed. 683, 685 (C. C. A. 8th, 1918) (Missouri).

103. See *Hutchins v. Kimmell*, 31 Mich. 126, 132 (1875); *Dumaresly v. Fishly*, 10 Ky. 368, 369 (1821). See also *Meister v. Moore*, 96 U. S. 76, 81 (1877).

104. See Billig and Lynch, *Common-Law Marriage in Minnesota: a Problem in Social Security* (1938) 22 MINN. L. REV. 177, 179 n. 4.

105. See Lynch, *Social Security Encounters Common-Law Marriage in North Carolina* (1938) 16 N. C. L. REV. 255. And see *Report of Special Committee on Workmen's Compensation* (1934) 6 PA. B. A. Q. 93, 98.

106. Compare 40 STAT. 400 (1917) with 56 STAT. 384, 385 (1942), 37 U. S. C. §§ 212, 220 (Cum. Supp. 1945).

107. See KOEGEL, *COMMON LAW MARRIAGE* (1922) 101; Note (1941) 15 TEMP. L. Q. 541, 542 n. 17.

108. The only known cases thus far have been on the trial court level. See cases cited *supra* notes 22 and 98.

109. See Ashby, *Proxy Nuptials Plague V. A.*, United Press feature, *Louisville Courier-Journal*, Apr. 16, 1946, p. 11, col. 1.

110. On the origins of personal liability, see MANSFIELD, *THE COMPTROLLER GENERAL*

this last factor, the wartime administrative opinions perhaps represent a more cautious than accurate portrayal of the law in the State concerned.

The Comptroller General,¹¹¹ in passing on vouchers submitted for officer's dependency allowance¹¹² in absentee marriage cases, has followed the principle that

"generally, in the absence of a statute or decision of a proper court to the effect that such marriages are recognized or authorized in a particular jurisdiction, such marriages will not be recognized . . . as establishing an officer's right to increased allowances on account of a 'lawful wife'." ¹¹³

The Office of Dependency Benefits originally enunciated a less conservative policy, authorizing family allotments based on absentee marriage of enlisted men "if in the opinion of the Attorney General of the state of celebration, such a marriage is valid," ¹¹⁴ but, in practice, was inclined to follow the lead of the Comptroller General.¹¹⁵

The Veterans Administration, in absentee marriage claims for National Service Life Insurance payments, has withheld decision

"pending action by the courts of the particular jurisdiction. . . . However, where the question arises in those states which recognize common law marriage and the facts are such as to meet the requirements of a valid common law marriage, the same are recognized by the Veteran's Administration as valid common law marriages, even though the courts of that jurisdiction have not as yet passed on the validity of proxy marriages." ¹¹⁶

The Judge Advocate General of the Army has "consistently refrained from expressing an official opinion" ¹¹⁷ on absentee marriage, but has from time to

(1939) 123-7. Liability under the Servicemen's Dependents Support Act of 1942 arises only on gross negligence or fraudulent intent. 56 STAT. 384 (1942), 37 U. S. C. § 212 (Cum. Supp. 1945).

111. In practice, the Comptroller General frequently gives advance opinions on the allowability of payments. See MANSFIELD, *THE COMPTROLLER GENERAL* (1939) 101.

112. See 56 STAT. 361 (1942) 37 U. S. C. §§ 104, 106 (Cum. Supp. 1945).

113. Decision B-46242, Feb. 7, 1945, p. 6 (marriage by proxy in the District of Columbia). The principle was cited and followed in subsequent opinions. B-51263, Nov. 2, 1945 (Mexico); B-53572, Nov. 21, 1945 (New Mexico); B-52448, Nov. 26, 1945 (Kansas); B-49442, June 13, 1945 (Oklahoma); B-48905, May 16, 1945 (Florida).

114. OFFICE OF DEPENDENCY BENEFITS, SERVICEMEN'S DEPENDENTS ALLOWANCE ACT OF 1942 ANN. (1944) 44-5, quoted, Communication to YALE LAW JOURNAL from Lt. Col. Isidore Hornstein, Legal Branch, O. D. B., Jan. 24, 1946.

115. Communication cited *supra* note 114. Payments under the Act are not, however, subject to review by the Comptroller General. 56 STAT. 384 (1942), 37 U. S. C. § 212 (Cum. Supp. 1945).

116. Communication to YALE LAW JOURNAL from Edward E. Odom, Solicitor, Veterans Administration, Feb. 5, 1946.

117. Communication to YALE LAW JOURNAL from Lt. Col. Milton J. Blake, Legal Assistance Branch, Judge Adv. Gen., A. U. S., Jan. 31, 1946.

time prepared memoranda for Legal Assistance Officers on the subject.¹¹⁸ The guiding policy has been

"that servicemen generally will be advised not to undertake such marriage unless there are special compelling circumstances which can only be solved by immediate marriage, and then only when they have been advised of the doubtful legal effect of such action and are willing to take such risk."¹¹⁹

The Federal Security Agency, pursuant to Section 209(m) of the Social Security Act,¹²⁰ has followed state law and, accordingly, has generally looked to the law of the place of celebration to determine the validity of absentee marriage for social security purposes.¹²¹

The principles adopted by administrative agencies leave much to be desired from the standpoint of the couple married in absentia. Extraneous considerations, such as the attitude of a particular attorney general or the fear of a given administrator of personal liability, affect the determination of the law. A marriage may be pronounced valid for the purposes of the one agency and invalid for the purposes of another.¹²² It seems probable that in the near future this resultant conflict must be determined by the courts or by the legislatures. In addition to the normal litigational sources,¹²³ the ad-

118. See J. A. G. Legal Assistance Memoranda: No. 10, Jan. 17, 1944, ¶ 2; No. 17, July 14, 1944, ¶ 3; No. 18, Aug. 10, 1944, ¶ 2; No. 23, Jan. 31, 1945, ¶ 5; No. 25, Apr. 20, 1945, ¶ 3 and app.; No. 27, June 11, 1945, ¶ 5; No. 28, July 16, 1945, ¶ 5; No. 29, Aug. 1, 1945, ¶ 4; No. 33, Nov. 19, 1945, ¶ 4 and app.; No. 34, Dec. 29, 1945, ¶ 4.

119. J. A. G. Legal Assistance Memorandum No. 10, Jan. 17, 1944 ¶ 2(b).

120. 49 STAT. 625 (1935), 42 U. S. C. § 409(m) (1940).

121. Sustained: marriages by proxy celebrated in Japan and Dalmatia. Rejected: marriages by proxy celebrated in Pago-Pago, Hawaii, and Washington. Communication to YALE LAW JOURNAL from Earle V. Simrell, Ass't Gen. Counsel, Fed. Security Agency, Feb. 18, 1946.

122. The Comptroller General does not undertake to pass on the validity of absentee marriage other than for purposes of allowances. Communication to YALE LAW JOURNAL from Frank L. Yates, Ass't Comp. Gen., Feb. 12, 1946. Cf. *Silva v. Tillinghast*, 36 F. (2d) 801 (D. Mass. 1929) (Portuguese proxy marriage valid, but under Federal statute, *supra* note 100, does not establish marital status for immigration purposes), and *REP. ATT'Y GEN. OF N. Y.* (1934) 371 (marriage by mail may be valid, but will not be recorded by Dep't of Health). This practice is analogous to the English common law attachment of different legal consequences to marriages differently formed. See *Roberts v. Roberts*, 58 Wyo. 438, at 450, 133 P. (2d) 492, at 495 (1943).

123. Common law marriage has arisen almost entirely as a collateral issue, most frequently in inheritance [see, e.g., *Fryer v. Fryer*, Rich. Eq. Cas. 85 (S. C. Ct. of App. 1832); *Lefkoff v. Sicro*, 189 Ga. 554, 6 S. E. (2d) 687 (1939)] and domestic relations cases [see, e.g., *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36 (1887) (divorce); *Riddle v. Riddle*, 26 Utah 268, 72 Pac. 1081 (1903) (separate maintenance)]. And see *State v. Worthingham*, 23 Minn. 528 (1877) (bastardy); *Hantz v. Sealy*, 6 Binney 405 (Pa. 1814) (assumpsit); *Dumaresly v. Fishly*, 10 Ky. 368 (1821) (slander); *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829 (1895) (deceit); *Graham v. Bennett*, 2 Cal. 503 (1852) (abduction); *Millford v. Worcester*, 7 Mass. 48 (1810) (pauper's support); *The Lauderdale Peerage*, 10 App. Cas. 692 (H. of L., Comm. on Privileges, 1885) (peerage); *State v. Wilson*, 121 N. C. 650, 28 S. E. 416 (1897) (seduction); *Goodrich v. Cushman*, 34 Nebr. 460, 51 N. W. 1041 (1892) (clear title); *in re Walsh*, 54 F.

ministrative rulings may force the issue.¹²⁴

CONCLUSION

The leading rationale on which decisions as to the validity of absentee marriage are predicated will vary in application because of intricacies of local law and the facts of specific cases. However, in passing on the validity of absentee marriage, the courts may well consider that the issues decided transcend the controversy immediately before them.

In those jurisdictions where court or legislature has previously foreclosed any form of marriage not in strict compliance with statute, absentee marriage merits legislative consideration. When a state assumes the authority to prescribe the sole conditions under which its citizens may assume so basic a relation as that of marriage, it incurs the responsibility of making certain, in so far as possible, that the privilege of marrying is denied only by design, and not by inadvertence.

In jurisdictions where the courts approve absentee marriage, the legislature may well consider possible limitations on such privilege. The utility of absentee marriage in wartime does not necessarily justify its existence in peacetime, when it may be used as another channel for evasion of police restrictions.¹²⁵ In jurisdictions where absentee marriage has been performed during the war, it may also be advisable for legislatures to consider curative statutes,¹²⁶ expressly validating absentee marriages previously performed.

The serviceman who has deemed it advisable to resort to absentee marriage while detained by his country overseas deserves to have his plight considered,—whether in legislature, courtroom or administrative office,—in the light of sound considerations of basic policy rather than naked legalism or inertial adherence to convention.

Supp. 769 (E. D. Pa. 1944) (naturalization); *Dawson v. U. S.*, 10 F. (2d) 106 (C. C. A. 9th, 1926) *cert. denied* 271 U. S. 687 (1926) (Mann Act conspiracy); *Carmichael v. State*, 12 Ohio St. 553 (1861) (bigamy).

124. An immediate objective in the *Hardy* case, *supra* note 22, was cancellation of family allowance procured by the "wife." Communication to YALE LAW JOURNAL from S. Ralph Stone, Independence, Mo. attorney, Mar. 19, 1946. Judicial review of the Comptroller General's decisions is possible by (1) suit by the government to recover disallowed payment from disbursing officer or surety, (2) suit in the Court of Claims by (a) the claimant or (b) the disbursing officer after refunding disallowed payment, or (3) suit for mandamus or mandatory injunction to compel payment. MANSFIELD, *THE COMPTROLLER GENERAL* (1939) 106-7. The Veteran's Administration is authorized to interplead claimants under a given National Service Life Insurance policy in the appropriate Federal court. 43 STAT. 612 (1924), 38 U. S. C. § 445 (1940). Declaratory judgment [see *Hardin v. Davis*, 30 Ohio O. 524, (C. P. Hamilton County 1945)] and mandamus to compel registration of an absentee marriage [see *State ex rel. Felson v. Allen*, 129 Conn. 427, 29 A. (2d) 306 (1942)] are convenient direct avenues for securing a state court adjudication without awaiting the fortuity of death, crime, or marital discord.

125. See note 101 *supra*.

126. See 1 VERNIER, *AMERICAN FAMILY LAWS* (1931) § 20. And see Note, L. R. A. 1915E, 8, 21-2 (Texas bond marriages and curative statutes).